STATE OF MICHIGAN

COURT OF APPEALS

NANCY ANN DESANDOLO, Plaintiff-Appellant,	UNPUBLISHED April 26, 2002
v	No. 237290 Van Buren Circuit Court
RONALD JOHN MELLON, Defendant-Appellee.	LC No. 99-046176-DZ

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court denying her motion for a change in custody. We affirm.

Plaintiff, Nancy DeSandolo, and defendant, Ronald Mellon, have two children, Jeffrey ("Jeff") and James ("Jimmy"). Jimmy is fifteen years of age.[1] Plaintiff resides in Colorado, where the family originally lived. Defendant resides in Mattawan, Michigan, where he has lived with the children for approximately two years. Defendant was granted physical custody of both children through a 1996 Colorado divorce judgment. On December 6, 2000, the Van Buren Circuit Court entered an order denying plaintiff's motion to change custody, thereby confirming defendant's continued sole physical custody of the children. The circuit court's decision on that motion is not at issue in this appeal. On April 23, 2001, plaintiff filed another motion for change in custody, alleging a change of circumstances, and that it was in her sons' best interest to live with her. After an evidentiary hearing, the trial court denied this motion, and plaintiff now appeals.

During the custody hearing held on December 5 and 6, 2000, Jimmy requested, but was denied, a meeting with the judge in chambers in order to discuss his preference for living with his mother. Plaintiff alleges that the trial court's failure to hold an in-camera interview on these hearing dates was reversible error. We disagree.

[1] At the time of the April 23, 2001 motion, custody of both children was at issue. However, since then Jeff turned eighteen and graduated from high school. Therefore, only the custody of Jimmy, the remaining minor child, is at issue here.

In *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) we set forth the applicable standards of review in child custody cases:

> We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. *Id.* Questions of law are reviewed for clear legal error. *Fletcher, supra*, 229 Mich App 24, citing MCL 722.28; MSA 25.312(8), and *Fletcher, supra*, 447 Mich 881. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher, supra*, 229 Mich App 24, citing *Fletcher, supra*, 447 Mich 881.

Custody disputes are to be resolved by determining the child's best interest, which is measured by consideration of the twelve factors set forth in the Child Custody Act, MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). "One of these factors is the 'reasonable preference of the child.'" *Duperon v Duperon*, 175 Mich App 77, 81; 437 NW2d 318 (1989); MCL 722.23(i). The child's preference must be evaluated, along with all other factors. *Id*. It is sufficient that the trial court is aware of the child's preference and that the preference is taken into consideration in the court's best interests analysis. *Id* at 181-182.

On the basis of two previous interviews with Jimmy regarding his preference, which occurred in December 2000 and May 2001, and Jimmy's trial testimony that he desired to live in Colorado, the trial judge acknowledged and took into consideration Jimmy's preference to live with his mother:

> Clearly the preference of the child is to be with plaintiff/mother. The court has been aware of this preference since May when the court conducted an interview with the minor child on this matter. . . .

Accordingly, the trial court, in its assessment of Jimmy's best interest, determined that this factor weighed in favor of plaintiff.

While the failure to investigate the child's preference in a meaningful way could constitute reversible error, *In re Custody of James B*, 66 Mich App 133, 134; 238 NW2d 550 (1975), in this case the trial judge clearly indicated on the record his awareness and consideration of Jimmy's preference. The only purpose of an additional interview would have been to establish a preference of which the court was already aware. Accordingly, the trial court addressed this factor correctly. Therefore, plaintiff's argument is without merit.[2]

---

[2] Although there is no legal prohibition to calling as a witness a child involved in the custody proceeding, we have repeatedly noted the obvious emotional trauma that a minor child of any age could experience by having to testify in open court regarding the actions of either or both

(continued…)

Plaintiff next contends that the trial court improperly limited the scope of the evidentiary hearing to the period of time between the December 2000 custody hearing and April 23, 2001, the date the instant motion for change in custody was filed. Again, we disagree.

As noted, resolutions of child custody disputes are governed by an analysis of the best interest factors set forth in the Child Custody Act, MCL 722.23. When considering the best interests of the child, the court must consider all pertinent and relevant factors "on record as it stands at the time of hearing." *Adams v Adams*, 100 Mich App 1, 14; 298 NW2d 871 (1980).

Although the trial court stated that the relevant time period for consideration in the instant motion was from December 6, 2000 to April 23, 2001, plaintiff concedes that the court allowed "complete testimony" and "made significant inquiry" into events occurring outside of this time frame. This fact is evidenced by the trial court's in-depth questioning on the subject of Jimmy's attendance at military school and as to allegations of Jimmy's substance abuse, each issue having arisen after April 23, 2001. Furthermore, Dr. Jeffrey Mahler, a licensed clinical psychologist, testified and was questioned at length with regard to sessions with Jimmy during the summer of 2001, which is also outside of the scope of the stated time frame.

Furthermore, in its written opinion, the trial court specifically cited to the above-mentioned events. In fact, plaintiff conceded that in its written opinion the trial court properly considered facts and testimony regarding events occurring after April 23, 2001. For example, in her brief on appeal, plaintiff agreed that "the court properly considered facts and testimony regarding James' alleged substance abuse, including information that arose after April 23," and that "the court properly considered one portion of Dr. Mahler's testimony."

Nonetheless, plaintiff contends that several references in the trial court's opinion regarding events occurring before or after April 23, 2001 were limited, incomplete, or not properly considered. For instance, plaintiff complains that only "passing reference" was made with regard to Jimmy's military school attendance and that the opinion "provides absolutely no analysis of the significance or relevance of James military school attendance. . ." Plaintiff also complains that the court referred to only portions of Dr. Mahler's testimony. However, we have established that the trial court need not comment with respect to every matter in evidence or to declare the acceptance or rejection of every proposition argued. *LaFleche v Ybarra*, 242 Mich App 692, 702 ; 619 NW2d 738 (2000). Therefore, regardless of the trial court's statement as to the proper scope of evidence, it is apparent that the court reviewed and considered facts and evidence outside of the stated scope. Because the trial court considered evidence outside of the stated time frame, it cannot be said that it exhibited clear legal error. Therefore, plaintiff's argument regarding this issue is without merit.

(…continued)

parents. See, *Molloy v Molloy*, 247 Mich App 348, 351-352; 637 NW2d 803 (2001), lv pending, and cases cited therein. Although an in-camera interview cannot be utilized for any purpose other than determining the reasonable preference of the child, *Id.*, there are ample alternative means available to accommodate a child's testimony (if one party insists on that testimony coming into evidence) other than having it presented in open court in front of his parents or other family members.

Finally, plaintiff asserts on appeal that the trial court breached its duty to conduct a fair and impartial hearing by initiating extrajudicial communications with Jimmy's probation officer with regard to whether Jimmy had completed his probation, and then utilized the information in its best interests analysis.[3]

Canon 3(A)(4) of the Michigan Code of Judicial Conduct states, in pertinent part:

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending decision, except as follows:
>
> * * *
>
> (e) A judge may initiate or consider ex parte communications when expressly authorized by law to do so. [Michigan Code of Judicial Conduct, Canon 3(A)(4).]

Michigan law does not expressly authorize a family division judge to initiate, permit, or consider communications outside the presence of the parties concerning the pending matter. Furthermore, it has been established that the trial court's ultimate findings regarding custody must be based upon competent evidence presented at the hearing. *Duperson, supra* at 79. Specifically, we have previously held that it was error for the trial court, in making child custody determinations, to weigh any evidence not made part of the record. *Dempsey v Dempsey*, 96 Mich App 276, 284; 292 NW2d 549; modified 409 Mich 495 (1980).

In its opinion, the trial court clearly considered information obtained through extrajudicial communication with Jimmy's probation officer. This was error. *Dempsey, supra.* Nevertheless, it is inappropriate to remand the issue for reevaluation because the error was harmless. MCR 2.613. The Michigan Supreme Court has described the harmless error test as follows:

> First, is the error so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless? . . . Second, if not so basic, can we declare a belief that the error was harmless beyond a reasonable doubt?

Reetz v Kinsman Marine Transit Co., 416 Mich 97, 103 n #7; 330 NW2d 638 (1982)(citations omitted)*; Heshelman v Lombardi,* 183 Mich App 72, 85; 454 NW2d 603 (1990).

Plaintiff in this case failed to make the requisite showing that the error was not harmless. The issue as to whether Jimmy completed his probation was the only fact utilized from the

[3] Plaintiff also contended that the trial court wrongfully collected and implemented extrajudicial testimony with regard to whether the probation officer believed Jimmy to have a drug problem. This argument, however, is without merit as this information is independently on the record. Specifically, plaintiff herself made statements, on the record and without objection, detailing a conversation with the probation officer whereby the probation officer concluded that Jimmy did not have a drug problem. There is no indication on the record, or anywhere else, that this information was obtained by any other means. Thus, the trial court did not err in considering this evidence, which properly existed on the record.

conversation with the probation officer. The only best interest factor in which the trial judge references such information is the "home, school, and community record of the child" factor. The trial court, however, considered a number of alternate issues when deciding that this factor favored neither party. Furthermore, the disputed information was also in the record. Based on the foregoing, any error committed by the trial court was harmless.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray